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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY and DAKOTA, MINNESOTA & EASTERN RAILROAD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Interstate Commerce Commission's jurisdiction over financial transactions concerning railroads relieve the rail carriers participating in such transactions of their obligations under the Railway Labor Act to bargain for the protection of employees when the Commission has concluded that employee protections are not required to be imposed as an exercise of its discretion under the Interstate Commerce Act?

2. Do the United States District Courts have jurisdiction to enforce the commands of the Railway Labor Act, even though the rail carrier, which is claimed to have violated the Railway Labor Act, is participating in a transaction exempted from regulation by the Interstate Commerce Commission?

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CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY and DAKOTA, MINNESOTA & EASTERN RAILROAD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Railway Labor Executives' Association [hereinafter, "RLEA"] [1] respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the decision of that court which was entered on May 31, 1988, in *RLEA v. Chicago & North Western Transportation Company, et al.*, 8th Cir. No. 87-5071.

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[1] RLEA is an unincorporated association of the Chief Executive officers of nineteen (19) labor organizations which collectively represent virtually all organized rail employees in this country, including rail employees of respondent Chicago & North Western Transportation Company. A list of RLEA's member organizations is attached to this petition as Appendix F at 20a.

OPINIONS BELOW

The decision of the court of appeals is not reported at this time, but is reproduced herein at pages 1a-5a as Appendix A. The Judgment of the appellate court is reproduced herein at page 14a as Appendix D. None of the decisions by the United States District Court for the District of Minnesota is reported officially. The district court's decision from which the appeal was taken was given orally on January 7, 1987 and is reproduced herein at pages 6a-7a as Appendix B-1. Included as a part of that Appendix, at page 8a, is the order entered by the district court on January 8, 1987, granting respondents' motions for summary judgment. Petitioner has also included in the Appendix to this Petition at pages 9a-10a, as Appendix B-2, the decision of the district court which was rendered orally on August 27, 1986, denying petitioner's request for a preliminary injunction to enjoin the sale of the rail line at issue; the order entered by the district court on August 27, 1986, formalizing that ruling is reproduced herein at page 11a. Reproduced herein at pages 12a-13a as Appendix C is the Notice of Exemption which the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] served on September 8, 1986, dealing with the sale which is at issue in this case.

JURISDICTION

The divided opinion of the panel of the Eighth Circuit, with Chief Circuit Judge Lay dissenting, was entered on May 31, 1988. Petitioner has not sought rehearing, and is filing this petition within the time prescribed by 28 U.S.C. § 2101(c). Petitioner is seeking to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Like several other petitions which are pending before this Court (*e.g.*, Sup. Ct. Nos. 87-1911 and 87-1888), this case involves the relationship between two Acts of

Congress regulating aspects of interstate commerce—*i.e.*, the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* This case, however, involves primarily the impact of Sections 10505 and 10901 of the Interstate Commerce Act, 49 U.S.C. §§ 10505, 10901, on the rights protected and obligations imposed by Sections 2 First, 2 Seventh and 6 of the Railway Labor Act, 45 U.S.C. § 152 First, 152 Seventh and 156. Those statutory provisions are reproduced herein at pages 15a-19a as Appendix E.

STATEMENT OF THE CASE

This case is another in a series of cases which have arisen from the rail industry's exploitation of the ICC's belief that Congress has given that agency exclusive jurisdiction over all aspects of rail financial transactions subject to its regulation, including labor relations matters. As this case shows, the lower courts are irreconcilably divided as to the proper relationship between the ICC's authority over rail financial transactions and rail labor's collective bargaining rights under the Railway Labor Act.

Respondent Chicago & North Western Transportation Company [hereinafter, "C&NW"] is a class I rail carrier that in early 1986 operated over 7,000 miles of rail lines in the midwestern portion of this country. Like most railroads in this country, respondent C&NW has been examining its rail system to identify lines that were not, in its opinion, adequately contributing to its financial viability, and prior to 1985 it used the abandonment provisions of the Interstate Commerce Act, 49 U.S.C. § 10903, to shed itself of those undesirable lines. In 1985, however, respondent C&NW "determined to seek alternative methods of disposition of marginal or light-density lines other than abandonment." Joint Appendix in 8th Cir. No. 87-5071 [hereinafter, "J.A."] at 47. That "alternative method" was to take advantage of a

newly promulgated policy of the ICC whereby the Commission had granted a class exemption under 49 U.S.C. § 10505 to all newly-formed rail carriers from the prior approval requirements of 49 U.S.C. § 10901. *Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1985), *aff'd sub nom. Illinois Commerce Comm. v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (table). The attractiveness of that policy to the C&NW was that the Commission had concluded that it should not exercise its discretion under Section 10901 to impose upon the selling rail carrier the fair arrangement for the protection of employees which it was required by the abandonment provisions of the Interstate Commerce Act, *i.e.*, 49 U.S.C. § 10903(b)(2),[2] to impose for the protection of employees affected by an abandonment.[2] *See, Ex Parte No. 392, supra*, 1 I.C.C. 2d at 815.

In July 1986, respondent C&NW entered into an agreement with respondent Dakota, Minnesota & Eastern Railroad Corporation [hereinafter, "DM&E"], a newly-formed rail carrier, whereby the C&NW would sell an 826-mile portion of its line to the DM&E for continued rail operations, and would grant or assign to that new carrier trackage rights over an additional 139 miles of track. J.A. at 47, 61. That agreement did not require the DM&E to assume the C&NW's collective bargaining agreements, and although the DM&E planned to hire approximately 144 employees and to give "preference in hiring to" C&NW employees (J.A. at 104), those employees would work under entirely new rates of pay, rules and working conditions. Respondent C&NW in-

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[2] That form of employee protection, known as the *Oregon Short Line* conditions, was promulgated in *Oregon Short Line R.R.—Abandonment*, 360 I.C.C. 91 (1979), and is similar in both monetary and procedural protections to those imposed in merger and purchase cases, *i.e.*, the *New York Dock* conditions. *New York Dock Ry.—Control*, 360 I.C.C. 60 (1979) *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

tended to abolish 169 positions when it sold that line. J.A. at 60.

Once rail labor learned of the possible sale, seven RLEA member organizations which represent C&NW employees served notices on respondent C&NW under Section 6 of the Railway Labor Act, 45 U.S.C. § 156, to negotiate agreements to require advance notice of any sale, to provide protections for employees similar to those normally imposed by the ICC in abandonment cases, to require the C&NW to obtain a commitment from any purchaser of its lines to hire the affected employees, to apply the C&NW rates of pay, rules and working conditions, and to give ICC-type protections to affected employees. J.A. at 34. As respondent C&NW informed the district court (J.A. at 62; emphasis added):

> In each case, the C&NW responded to those notices in writing by proposing a meeting date *to discuss* the demands but informing the organization that such meeting was without prejudice to the carrier's position that such notices were improper because they usurped matters within exclusive managerial prerogatives, usurped matters within the sole jurisdiction of the Interstate Commerce Commission and matters preempted by the Interstate Commerce Act and they related to matters not within the proper scope of collective bargaining agreements with the organization.

While rail labor and the C&NW were engaged in those "discussions," both the C&NW and the DM&E filed verified notices with the ICC on August 14, 1986, to exercise the exemption which had been granted by *Ex Parte 392*; under the Commission's regulations, that exemption became effective on August 21, 1986. RLEA responded by filing a suit with the United States District Court for the District of Minnesota on August 19, 1986, seeking both declaratory and injunctive relief to require respondent C&NW to bargain with rail labor over the

impact of the proposed sale on its employees and over the pending Section 6 notices. Petitioner also sought to enjoin the C&NW from changing the status quo until it had complied fully with its bargaining obligations under the Railway Labor Act. J.A. at 13-14. RLEA thereafter sought a preliminary injunction to restrain respondents from altering the status quo by selling the line. J.A. at 2.

On August 27, 1986, the district court denied RLEA's injunctive request. Appendix B-2 at 9a-11a. According to the district court: "I am convinced that if I were to grant the preliminary injunction, I would be clearly at loggerheads with the decision of the ICC, particularly as expressed in Ex Parte 392." *Id.* at 9a-10a. Rail labor did not seek appellate review of that ruling and on September 4, 1986, the C&NW sold its line to the DM&E. J.A. at 180-81. As a result of that sale, the C&NW abolished at least 169 positions; the DM&E then hired 101 C&NW employees to staff its operations. J.A. at 93, 97, 181.

RLEA thereafter sought to enforce the bargaining obligations of the Railway Labor Act through its suit and to obtain back pay for the employees who were affected by the premature alteration of the status quo. But on January 7, 1987, the district court granted respondents' motions for summary judgment ruling that (Appendix B-1 at 6a):

> This case is going to depend upon whether [*Ex Parte*] 392 in its present form applies or sinks. That's going to require decisions by courts higher than this one. But to this Court, a reading of Ex Parte 392 demonstrates that the ICC felt that it is the final authority in determining whether to impose labor protection in the sale of lines to the new carriers. And the decision favorable to plaintiff would put this Court directly at odds with the regulatory scheme established by Ex Parte 392.

RLEA noted an appeal to the United States Court of Appeals for the Eighth Circuit.

On appeal, as well as before the district court, appellee C&NW argued that an alternative reason for denying rail labor's request for injunctive relief was that the dispute between the C&NW and its unions was in reality a "minor dispute"[3] under the Railway Labor Act because the carrier claimed it had the contractual right from its Reduction In Force provisions in its collective bargaining agreements, and from the past practice concerning line abandonments, to sell its line and abolish jobs without first engaging in bargaining under the Railway Labor Act. C&NW Brief in 8th Cir. No. 87-5071 at 44-49. RLEA, on the other hand, maintained that the dispute was a "major" dispute (*see* note 3, *supra*) which required both notice and bargaining, because, by selling its rail lines, respondent C&NW was altering existing working conditions. RLEA Brief in 8th Cir. No. at 87-5071 at 16-18.

On May 31, 1988, the Eighth Circuit issued its decisions in this case and in *Burlington Northern R.R. v. UTU*, 8th Cir. Nos. 87-2581 and 87-2600,[4] in which the court

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[3] A "minor dispute" under the Railway Labor Act is one "growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a(5); *see, Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 722-23 (1945). This form of dispute is to be contrasted with a "major dispute" which is one "concerning rates of pay, rules, or working conditions" (45 U.S.C. § 151a(4)) and arises where a party seeks to formulate a new agreement or to alter an existing one unilaterally. *Elgin, Joliet & Eastern Ry. v. Burley, supra.* This distinction is important, because minor disputes may not be resolved by a strike, but are to be resolved by adjustment boards which have exclusive jurisdiction to interpret collective bargaining agreements.

[4] The Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* was also at issue in the *Burlington Northern* case. RLEA reproduced the *Burlington Northern* decision as Appendix A to its brief in response to the petition in Sup. Ct. No. 87-1589, *Pittsburgh & Lake Erie R.R. v. RLEA*. That decision was also submitted by the Pittsburgh &

addressed the relationship of the Interstate Commerce Act to the Railway Labor Act. In this case, the court observed that rail labor had served Section 6 notices to bargain over the sale and its impact on employees, and then stated (Appendix A at 3a, *quoting Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 149, 153 (1969)):

> Under the terms of the RLA, these notices set in motion a lengthy bargaining process during which the status quo, i.e., the "actual objective working conditions" in existence at the beginning of the dispute, must be preserved.

Although the appellate court rejected respondent C&NW's alternative minor dispute argument, it nevertheless went on to hold that the Interstate Commerce Act's provisions giving the ICC the power to impose employee protections "supersede the mandatory bargaining requirement of the RLA." *Id.* at 4a. The court then quoted as follows from its *Burlington Northern* decision (*Id.* at 4a-5a; emphasis in original):

> Under the ICA, Congress sought to provide the ICC with the means to prevent labor strife by assuring "fair wages and working conditions in the railroad industry." 49 U.S.C. § 10101a(12). To accomplish this important *but limited aim*, Congress provided the ICC superseding authority to supervise and implement labor protective conditions in terms of acquisitions, sales, and abandonments of railroad lines. Yet it did so only insofar as this authority is necessary to "assure fair wages and working conditions" in order to ensure the free flow of commerce. In these narrow circumstances, the ICA supersedes the mandatory bargaining provisions of the RLA which provide an essentially duplicative or overlapping process designed to reach labor protective agreements.

Chief Circuit Judge Lay dissented from the panel's decision. Agreeing with the Third Circuit's conclusion in

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Lake Erie Railroad in a Supplemental Brief which it filed in Sup. Ct. No. 87-1888.

RLEA v. Pittsburgh & Lake Erie R.R., 845 F.2d 420 (3rd Cir. 1988), *pet. for cert. pending*, Sup. Ct. No. 87-1888, Chief Judge Lay stated (*Id.* at 5a):

> I cannot agree that the Interstate Commerce Act . . . (ICA), was intended to supersede the mandatory bargaining requirements of the Railway Labor Act . . . (RLA). I do not believe that Congress intended the ICA proceedings to be a means of providing labor security and protection which is inherent under the mandatory bargaining procedure of the RLA. . . .

REASONS FOR GRANTING THE WRIT

This Case Presents Issues That Are Important To The Orderly Administration Of Two Acts Of Congress—The Interstate Commerce Act And The Railway Labor Act—Regulating Different Aspects Of Interstate Rail Commerce. Moreover, The Lower Courts Are Divided On The Proper Relationship Between These Two Important Acts Of Congress

1. In 1983, the ICC issued two decisions in which it concluded that its approval of unification financial transactions operated to relieve the rail carriers participating in those transactions from their obligations under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* ICC Finance Docket No. 30,000 (Sub-No. 18), *Denver & Rio Grande Western R.R.—Trackage Rights*, served May 18 and October 25, 1983 (reproduced in Appendix to ICC Petition for Certiorari in Sup. Ct. No. 85-792, *ICC v. BLE*, *at* 51a-68a). Although the ICC, in reaching that conclusion relied solely on the immunity granted by 49 U.S.C. § 11341(a) to carriers participating in unification transactions approved by the Commission, the Commission soon expanded its justification for stating that its orders relieved rail carriers of their Railway Labor Act and contractual obligations to their employees. In ICC Finance Docket No. 30532, *Maine Central R.R.—Exemption*, served September 13, 1985, *aff'd sub nom. RLEA v. ICC*, D.C. Cir.

No. 85-1636 (decided March 16, 1987) (unpublished) (reproduced in ICC's Petition in Sup. Ct. No. 85-792, *ICC v. BLE* at 40a-51a), the ICC stated that Congress gave it exclusive jurisdiction over all matters arising from rail financial transactions subject to its regulation under the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, including, in particular, labor relations matters; as the Commission stated: "It is manifest that Congress in 1976 intended the protection afforded labor to be limited by the conditions imposed in the pertinent Commission proceeding." *Id.* at 6; ICC Pet. at 49a. Since, according to both the ICC and the railroads, rail labor may look only to the Commission to protect its interests, it logically follows, their argument continues, that rail labor may not rely upon the Railway Labor Act to compel a rail carrier to negotiate over the manner in which employees will be affected by a transaction subject to regulation by the Commission.

Employee protective arrangements, as well as collective bargaining concerning management decisions which will have a crucial impact on employee working conditions, have been a way of life in the rail industry since the enactment of the Railway Labor Act in 1926, and, thus since long before the ICC began to impose provisions to protect employees in the late 1930's. *E.g.*, *United States v. Lowden*, 308 U.S. 225, 234-36 (1939); Agreement dated January 31, 1932 in Chicago, Illinois (Included in the Agreement Records of the National Mediation Board under 45 U.S.C. § 155 Third (e)). Consequently, it should not be a shock to anyone even vaguely familiar with the rail industry that the ICC's recent policy of being the sole source of employee protection in rail financial transactions would be eagerly accepted by the railroads, but as equally resisted by rail labor.

That is exactly what has happened, for over the past five years there has been a constant source of tension between rail labor and management as rail labor has re-

sisted the railroads' efforts to use the ICC's view of its powers both as a means to abrogate existing contractual rights and as justification for refusing to bargain for new rights to ameliorate the adverse consequences which flow from sales or from other changes in rail operators. Rail labor first appealed to the courts to enforce the Railway Labor Act, but initially that appeal was unsuccessful; the case at bar is one of the first rejections of rail labor's request for judicial assistance. Rail labor then engaged in strikes, and this brought a temporary lull in the railroads' onslaught. *RLEA v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3rd Cir. 1987), *pet. for cert. pending*, Sup. Ct. No. 87-1589. But now the carriers are attempting to get around the Norris-LaGuardia Act by asserting that these disputes are actually minor disputes subject to arbitration and thus enjoinable. *E.g.*, *Chicago & North Western Transportation Co. v. RLEA* N.D.ILL. No. 88 C 0444, decided March 16, 1988, *appeal pending*, 7th Cir. No. 88-1504 (argued April 21, 1988); *CSX Transportation, Inc. v. UTU*, W.D.N.Y. No. 87-CIV-1391C, decided May 26, 1988, *appeal pending*, 2d Cir. No. 88-7461.

Recently, the National Railway Labor Conference [hereinafter, "NRLC"] [5] informed this Court that: "[Rail labor's efforts to enforce its statutory and constitutional rights to bargain] is the most litigated and most important railway labor-management controversy now facing the federal courts." NLRC Brief as *Amicus* in Sup. Ct. No. 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA* at 8. Indeed, in 1985, the NRLC expressed the same view in a case which arose from rail labor's attempt to have reviewed the ICC's conclusion in the *Denver & Rio Grande* decisions that its orders superseded the Railway Labor Act; as the NLRC stated in its brief as an *amicus* in

[5] *Amicus* NRLC "is an unincorporated association which includes almost all of the nation's Class I railroads among its members." NRLC Brief in No. 87-1888 at 4.

support of the ICC's petition in Sup. Ct. No. 85-792, *ICC v. BLE*: "The role of the RLA in disputes arising out of carrier efforts to implement ICC-approved rail transactions presents the most pressing labor issue in the rail industry today." NRLC Brief in Support of Petitions in Nos. 85-792 and 85-793 at 17. This Court apparently agreed in 1985 that this issue was important because it granted the petitions in those cases. Unfortunately, the Court did not reach the main issue as to the proper relationship between the two Acts (*see, ICC v. BLE*, 482 U.S. —, 96 L. Ed.2d 222 (1987)), and this problem has continued to worsen.

RLEA agrees fully with the NRLC's belief that the issues presented by this and other similar cases are important to the industry and need to be resolved by this Court. Rail labor and management are divided on fundamental issues which are essentially legal in nature and thus, will most likely not be able to resolve this dispute through negotiation; indeed, court bargaining becomes less likely when, as occurred in this case, a court informs the railroads that they are relieved of their bargaining obligations by the ICC's jurisdiction over rail sales. *E.g.*, Appendix A at 4a-5a. From the beginning of this dispute, rail labor and management have recognized that they need the help of the courts to resolve this dispute, but as a comparison of this case with the Third Circuit's decision in *RLEA v. Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3rd Cir. 1988), *pet for cert. pending*, Sup. Ct. No. 87-1888, shows, the lower courts are divided on the proper relationship between these two Acts of Congress. Thus, the industry clearly needs the aid of this Court to resolve this dispute. Since the issues presented by this case are so important to the orderly administration of both the transportation and the labor statutes, RLEA urges this Court to resolve this dispute.

2. In *RLEA v. Pittsburgh & Lake Erie R.R., supra*, the Third Circuit addressed the question of whether rail

labor could enforce the Railway Labor Act in a case arising out of a rail line sale which was exempted by *Ex Parte No. 392* from regulation under 49 U.S.C. § 10901. After addressing the purposes behind both Acts—*i.e.*, the Interstate Commerce Act and the Railway Labor Act—the Third circuit first rejected the carrier's argument that enforcement of the Railway Labor Act would be a collateral attack on the ICC's exemption, and then concluded that the ICC's exemption of the sale of the railroad under Section 10505 from the prior approval requirements of Section 10901, did not relieve the selling railroad of its obligations to its employees under the Railway Labor Act. In the *C&NW* case, on the other hand, the Eighth Circuit accepted the ICC's conclusion that Congress gave that agency exclusive jurisdiction over all labor relations matters arising from financial transactions and then concluded that "the ICA supersedes the mandatory bargaining provisions of the RLA which provide an essentially duplicative or overlapping process designed to reach labor protective agreements." Appendix A at 4a-5a. Those two decisions are clearly in conflict with each other. RLEA respectfully submits, the Third Circuit's decision represents the proper reading of the two Acts of Congress and reaches a result which assures continued rail operation; the Eighth Circuit's decision, however, does neither.

In the Eighth Circuit's companion case to the *C&NW* decision, *Burlington Northern R.R. v. UTU*, 8th Cir. Nos. 87-2581 and 87-2600, decided May 31, 1988, the Court explained why it concluded that the transportation statute superseded the Railway Labor Act. As the appellate court stated, the question presented was whether to "harmoniz[e]ing" a labor statute with a statute in another field, and since it erroneously surmised that the two statutes "provide an essentially duplicative or overlapping process designed to reach labor protective agreements," it concluded that the transportation statute superseded the labor statute. *Burlington Northern*, slip op. at 12 (RLEA

Brief in No. 87-1589 at 12a). That decision was only a part of the *Burlington Northern* case, for the court then followed the clear commands of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq*, and concluded that the federal courts lacked jurisdiction to enjoin a strike over the absence of a protective arrangement; as the appellate court explained (slip op. at 16, RLEA Brief in 87-1589 at 16a):

> . . . [T]his notion of the viability of the Norris-LaGuardia in the face of the supersedure of the RLA is clearly in line with what Congress intended. In examining the impetus behind the recent deregulatory efforts in the railroad industry, Congress has sought to free the union-management relationship from time-consuming, "process oriented" bureaucracy imposed by various regulatory statutes and to allow the sagacious invisible hand of the free market economy to reorder rapidly that industry's economic difficulties. . . .

Unfortunately, by refusing to enforce the Railway Labor Act, the Eighth Circuit has forced rail labor to use its economic power to bring the carriers to the bargaining table; the Railway Labor Act, however, was designed to prevent the need to use self-help for such an elementary purpose by imposing a legal obligation requiring the carrier to go to the bargaining table to resolve disputes *before* they reached the level that either side would need to use its economic power. Consequently, it is important to the national need for a rail service uninterrupted by labor strife that this Court resolve these diametrically opposed decisions by the Third and Eighth Circuits .

3. When the Eighth Circuit's sparsely reasoned decision is examined, it becomes clear that the court's conclusion rests on its assumption that the Railway Labor Act's bargaining processes, when compared to the ICC's responsibility to consider employee interests, constituted "an essentially duplicative or overlapping process designed to reach labor protective agreements." Appendix

A at 4a-5a. That assumption, RLEA respectfully submits, permeates all four of the cases, including this one, which are pending before this Court raising the issue of the proper relationship between the Railway Labor Act and the Interstate Commerce Act; *i.e.*, Sup. Ct. No. 87-1589, *Pittsburgh & Lake Erie R.R. v. RLEA* (Norris-LaGuardia Act case); Sup. Ct. No. 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA* (Railway Labor Act case); Sup. Ct. No. 87-1911, *RLEA v. Guilford Transportation Industries, Inc.* (Lease Exemption case).

All four of these cases have another fact in common, and that is that they all involve exemptions under 49 U.S.C. § 10505 from regulation under the Interstate Commerce Act. That factor, RLEA respectfully submits, is important to a proper balancing of the two Acts of Congress, for as the United States District Court for the Northern District of Illinois recently stated in *Burlington Northern R.R. v. UTU*, N.D.ILL. No. 88 C 2687, decided June 9, 1988 (slip op. at 18; RLEA Supplemental Brief in No. 87-1911 at 18a):[6]

> [T]ransactions exempted [under § 10505] from administrative approval are by definition transactions that do not impact the transportation policy of the ICA. The ICC exempts a transaction such as a trackage rights agreements [or, here, a § 10901 sale] only if the ICC finds that [regulation of] the transaction is not necessary to carry out the transportation policy" of the Staggers Act. . . . Thus, in any direct or indirect conflict between an exemption pursuant to § 10505 and a fundamental time-honored federal labor policy, the former must yield.

Three of the cases (*i.e.*, Sup. Ct. Nos. 87-1911, 87-1888 and this case) present the question of whether enforcement of the Railway Labor Act in exemption cases would

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[6] Petitioners are submitting the district court's decision in the latest *Burlington Northern* case to this Court in a Supplemental Brief in *RLEA v. Guilford Transportation Industries, Inc.*, Sup. Ct. No. 87-1911.

constitute an impermissible collateral attack on the ICC's exemption order. According to the First Circuit in the *Guilford* case and to the district court in this case, enforcement of the labor statute would constitute a collateral attack, whereas, according to the Third Circuit it would not. RLEA, of course, submits that the Third Circuit's decision is the correct ruling on this issue.

Another similarity which runs through the cases, although to differing degrees, are the questions of whether the carriers have an obligation under the Railway Labor Act to give notice under Section 6 of that Act, 45 U.S.C. § 156, and to preserve the status quo pending bargaining if RLEA is correct in asserting that the carrier's Railway Labor Act obligations are not excused by the ICC's jurisdiction over labor relations matters. While initially challenged in the *Guilford* case, the carriers' bargaining obligation is now too clear to be in serious dispute in that case. *E.g., Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330, 338-41 (1960); *ALPA v. Transamerica Airlines, Inc.*, 817 F.2d 510 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 451 (1987). However, a carrier's bargaining and status quo obligations are specifically raised in the second *Pittsburgh & Lake Erie* case (*i.e.*, Sup. Ct. No. 87-1888), and were raised in this case as an alternative justification to uphold the judgment.

When the various issues presented by the four cases are examined, RLEA respectfully submits, the *Guilford* case appears to be the best vehicle to resolve most of the issues which have been raised by rail labor's challenge to the ICC's opinion that the Commission has been charged by Congress with the exclusive responsibility to resolve labor disputes associated with rail financial transactions subject to its jurisdiction.[7] Therefore, RLEA once again urges this Court to review that case. But if

[7] The one issue which none of these cases addresses is whether Section 11341(a)'s immunity extends to a carrier's Railway Labor Act obligations.

this Court decides to address solely the conflict between the second *Pittsburgh & Lake Erie* case and this case, RLEA respectfully submits that this case is the better vehicle of those two for essentially two reasons. First, the Pittsburgh & Lake Erie's precarious financial situation, its active search for a purchaser, and the on-going mediation by the National Mediation Board all make it questionable whether that case will present a justiciable issue later this year or early next year; that same problem is not presented by the *C&NW* case. And second, the issues presented by the P&LE case as to whether a carrier has an obligation to bargain over the effects of its decision to go out of business, or whether enforcement of the Railway Labor Act is prohibited by the Fifth Amendment to the Constitution of the United States, do not raise issues over which the circuits are in dispute at this time and, more important, will further complicate an already complicated question which the parties have found difficult to brief in less than fifty (50) pages.

CONCLUSION

For the reasons set forth herein, petitioner RLEA respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review and to reverse the judgment of that court in *RLEA v. Chicago & North Western Transportation Co., supra.*

Respectfully submitted,

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Attorneys for Petitioner Railway Labor Executives' Association

Date: June 14, 1988

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5071

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY
and DAKOTA, MINNESOTA AND EASTERN RAILROAD,
Appellees.

STATE OF SOUTH DAKOTA,
Amicus Curiae/Appellee.

Appeal from the United States District Court
for the District of Minnesota

Submitted: December 18, 1987

Filed: May 31, 1988

Before LAY, Chief Judge, and HEANEY and MAGILL, Circuit Judges.

HEANEY, Circuit Judge.

In this appeal, the Railway Labor Executives' Association (RLEA) asks the Court to reverse the decision of the United States District Court for the District of Minnesota. The district court refused to enjoin the sale of a section of trackage by the Chicago & Northwestern Transportation Company (C&NW) to the Dakota, Minnesota & Eastern Railroad (DM&E) until C&NW exhausted the mandatory bargaining requirements of the Railway Labor Act, 45 U.S.C. §§ 151-188 (RLA). Because we find the RLA in this circumstance superseded by the authority of the Interstate Commerce Act, 49 U.S.C. §§ 10101-11917 (ICA), we affirm the district court.

C&NW had sought for many years to divest itself of certain marginal or light density rail lines in South Dakota. Normally, the sale or abandonment of rail lines is subject to the approval of the Interstate Commerce Commission (ICC). *See* 49 U.S.C. § 10901, 10903, 10905. The ICC had in the past refused to allow C&NW to rid itself of these rail lines because of the adverse impact of such action on the State of South Dakota.

In January, 1986, the ICC, in an ex parte rulemaking procedure, exempted as a class the sale of rail lines to "new carriers" from the prior approval requirements of the ICA. *See Ex Parte No. 392 (Sub. No. 1), Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1986), *review denied sub nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (*Ex Parte No. 392*). Following this change in ICC policy, C&NW agreed on July 2, 1986, to sell 826 miles of its rail lines and assign 139 miles of its South Dakota trackage to DM&E, a newly formed railroad.

Beginning in May of 1986, when they learned of the railroad's intention to sell, seven of the unions representing C&NW employees served notices on the C&NW as required under Section 6 of the RLA, 45 U.S.C. § 156.

These notices informed C&NW of the unions' intention to negotiate agreements to require both advance notification of any proposed transfer of rail lines and appropriate employee protective conditions. The unions further sought to obtain a pledge by C&NW to require DM&E to employ C&NW employees, to assume C&NW's collective bargaining obligations, and to apply appropriate employee protective arrangements. Under the terms of the RLA, these notices set in motion a lengthy bargaining process during which the status quo, i.e., the "actual objective working conditions" in existence at the beginning of the dispute, must be preserved. *Detroit & T. Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149, 153 (1969).

While the parties engaged in discussions, C&NW continued with its plans to sell the South Dakota lines. Pursuant to this goal, both the C&NW and the DM&E filed verified notices with the ICC under *Ex Parte No. 392* to qualify for exemption from prior approval requirements. Once it became apparent that C&NW intended to consummate the sale, notwithstanding the fact that it had not complied with the mandatory bargaining requirements of the RLA, RLEA, an umbrella organization made up of representatives of the various rail unions representing C&NW employees, filed a complaint in the United States District Court for the District of Minnesota on August 19, 1986. In its complaint, RLEA sought a declaratory judgment that C&NW had an obligation under the RLA both to bargain over the proposed transfer and to maintain the status quo until that bargaining was concluded. RLEA also sought interlocutory and then permanent injunctive relief requiring C&NW to bargain and maintain the status quo. C&NW replied that the mandatory bargaining requirements of the RLA were preempted by the provisions of the ICA governing sales and labor protective conditions.

On August 27, 1987, the district court denied RLEA's motion for a preliminary injunction, declaring such re-

lief would "be clearly at loggerheads with the decision of the ICC, particularly as expressed in Ex Parte 392." Shortly after that ruling, C&NW and DM&E consummated the sale, and on September 5, 1987, DM&E began operating over its newly acquired trackage. Once the sale was consummated, RLEA concentrated its attack on C&NW's bargaining obligation and duty to maintain the employment status quo of its employees whom RLEA asserted were improperly affected. Both sides moved for summary judgment. On January 7, 1987, the district court orally denied RLEA's motion, again finding that the ICC's action in *Ex Parte No. 392* would be undermined if the provisions of the RLA were enforced and C&NW was required to bargain with the railroad unions. This appeal followed.

In *Burlington Northern R.R. v. United Transp. Union*, No. 87-2851, slip op. (8th Cir. May 31, 1988), a case decided today involving a similar railroad transaction exempted under *Ex Parte No. 392* from normal ICC approval requirements, we held that the provisions of the ICA governing labor protective agreements supersede the mandatory bargaining requirements of the RLA. Specifically, we stated:

> Under the ICA, Congress sought to provide the ICC with the means to prevent labor strife by assuring "fair wages and working conditions in the railroad industry." 49 U.S.C. § 10101a(12). To accomplish this important *but limited aim*, Congress provided the ICC superseding authority to supervise and implement labor protective conditions in terms of acquisitions, sales, and abandonments of raiload lines. Yet it did so only insofar as this authority is necessary to "assure fair wages and working conditions" in order to ensure the free flow of commerce. In these narrow circumstances, the ICA supersedes the mandatory bargaining provisions of the RLA which provide an essentially duplicative or overlapping

process designed to reach labor protective agreements.

Id. at 12.

The RLEA's claim would require us to invoke the mandatory bargaining provisions of the RLA. Because in the present circumstances these provisions are superseded by the ICA, we affirm the decision of the district court.

LAY, Chief Judge, dissenting.

I respectfully dissent. I cannot agree that the Interstate Commerce Act, 49 U.S.C. §§ 10101-11917 (1982) (ICA), was intended to supersede the mandatory bargaining requirements of the Railway Labor Act, 45 U.S.C. §§ 151-188 (1982) (RLA). I do not believe that Congress intended the ICA proceedings to be a means of providing labor security and protection which is inherent under the mandatory bargaining procedure of the RLA. The ICA focuses on national transportation policy. *See* 49 U.S.C. § 10101a. Although the interest of labor may be asserted in proceedings before the Interstate Commerce Commission (ICC), I agree with the Third Circuit's view that it is highly unlikely "that Congress intended that rail labor look for its sole protection to an agency that lacks expertise in this field." *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, No. 87-3797, slip op. at 56 (3d Cir. Apr. 8, 1988). It is clear to me that the ICC lacks expertise in the field of labor security. I respectfully conclude that Congress did not intend to include labor protective conditions within the ICC proceedings so as to supersede labor's protective mechanisms under the Railway Labor Act.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B-1

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-86 Civ 738

RAILWAY LABOR EXECUTIVES ASSOCIATION,
Plaintiff,

vs.

CHICAGO and NORTHWESTERN TRANSPORTATION COMPANY, *et al.*,
Defendants.

TRANSCRIPT EXCERPT
ORAL RULING AND ORDER OF DISTRICT COURT GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

Wednesday, January 7, 1987
St. Paul Minnesota

* * * *

[18] THE COURT [Renner, J.] I have no questions. I am ready to rule, thank you.

This case is going to depend upon whether 392 in its present form applies or sinks. That's going to require decisions by courts higher than this one. But to this Court, a reading of Ex Parte 392 demonstrates that the ICC felt that it [19] is the final authority in determining whether to impose labor protection in the sale of lines to the new carriers. And the decision favorable to plaintiff would put this Court directly at odds with the regulatory scheme established by Ex Parte 392.

As the Court interprets 392, the ICC intended that sales of marginal lines be facilitated. Otherwise, if they weren't being facilitated, it was the ICC's position they were going to be abandoned, and it affirmatively exercised its discretion not to impose employee protection on this class of transaction, believing that such conditions would discourage acquisition of marginal lines and disserve the public interest.

The ICC did, however, establish a procedure for those "extraordinary" cases where the imposition of protections may be appropriate, whereby a labor union may seek to revoke the blanket exemption by petition in a particular case pursuant to 49 USC, Section 10505(d). Frankly, I see no case law supporting plaintiff's distinction between the ICC's approval or authorization of a short line sale and an ICC exemption from regulation which permits the sale to go forward. An exemption to the Court is no different than an authorization. A sale cannot go forward without one or the other.

I realize that the DC circuit opinion could stand as authority to the contrary. We will have to wait and see. It's very possible and maybe probable that the parties will see fit to appeal this Court's order and get a ruling in the Eighth [20] Circuit, so that everyone would better understand the law as it's going to be committed to posterity.

Because of the relief that plaintiff is seeking is so at odds with the ICC order in the present case, the only recourse it has is to the Court of Appeals, which has, as you know, exclusive authority to modify or rescind Ex Parte No. 392. So I am going to deny the plaintiff's motion cross-motion for summary judgment and grant the defendants' motion for summary judgment.

Are there any questions,

MR. MOORE [Counsel for C&NW]: No, Your Honor.

THE COURT: There being none, the matter will be deemed terminated.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-738

RAILWAY LABOR EXECUTIVE ASSOCIATION,
Plaintiff,

vs.

CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY and DAKOTA, MINNESOTA and EASTERN RAILROAD CORPORATION,
Defendants.

ORDER

Before the Court are defendants' motions for summary judgment and plaintiff's cross-motion for summary judgment. William J. Birney, Esq. appeared for plaintiff. Ralph J. Moore, Esq. appeared for defendant Chicago and Northwestern Transportation Company. Robert J. Corber, Esq. appeared for defendant Dakota, Minnesota and Eastern Railroad Corporation.

Based on the briefs and arguments of counsel and the entire file, IT IS HEREBY ORDERED that plaintiff's motion is denied and defendants' motions for summary judgment are granted.

Dated: January 8, 1987.

/s/ Robert G. Renner
ROBERT G. RENNER
United States District Judge

APPENDIX B-2

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civ 3-86-738

RAILWAY LABOR EXECUTIVES ASSOCIATION,
Plaintiff,

vs

CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY
and DAKOTA, MINNESOTA and
EASTERN RAILROAD CORPORATION,
Defendants.

TRANSCRIPT EXCERPT
ORAL RULING AND ORDER OF DISTRICT COURT
DENYING PETITIONERS' MOTION FOR A
PRELIMINARY INJUNCTION

Judge Renner
August 27, 1986
St. Paul, Minnesota

* * * *

[42] THE COURT [Renner, J.]: I am prepared to rule, rightly or wrongly, and I admit that it's an area that hasn't been chartered by a lot of the legal decisions which would be of any help. But I have pondered over the affect of the decision that I shall be rendering and I am convinced that if I were to grant the preliminary injunction, I would be clearly at loggerheads with the

decision of the ICC, particularly as expressed in Ex Parte 392. It does seem to me, rightly or wrongly, the matter will ultimately, I am sure, be resolved on appeal, whether this case or any case, that the ICC has assumed jurisdiction in this area, even where it might perhaps seemingly conflict with the Railway Act. I am going to deny the motion.

I am denying it also based upon my resolution of the other three aspects of Dataphase. I just feel that the threat [43] of irreparable injury—and I am impressed with the argument that really we are talking about 19 employees, and that they can be traced, the balancing of the equities and the public interest, and I am impressed with the demonstration of the interest as expressed in the amicus brief and with the assurances that rehabilitation to a line which is only the second railway operating in South Dakota, that I am safer and more likely doing justice by denying the application for preliminary injunction than were I to issue it.

That will be all.

* * * *

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-738

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Plaintiff,

vs.

CHICAGO and NORTH WESTERN TRANSPORTATION COMPANY and DAKOTA, MINNESOTA and EASTERN RAILROAD,
Defendants.

ORDER

Before the court is plaintiff's motion for a preliminary injunction. William J. Birney, Esq. appeared for plaintiff. Ralph J. Moore, Esq. appeared for defendant Chicago and North Western Transportation Company. Robert J. Corber, Esq. appeared for defendant Dakota, Minnesota and Eastern Railroad. Richard A. Allen, Esq. submitted a memorandum as amicus curiae for the State of South Dakota.

Based on the briefs and arguments of counsel, the record and the entire file, IT IS HEREBY ORDERED that plaintiff's motion is denied.

August 27, 1986.

/s/ Robert G. Renner
ROBERT G. RENNER
United States District Judge

APPENDIX C

Service Date Sep. 8, 1986

INTERSTATE COMMERCE COMMISSION

NOTICE OF EXEMPTION

Finance Docket No. 30889

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION—ACQUISITION AND OPERATION EXEMPTION—CHICAGO AND NORTH WESTERN TRANSPORTATION

Dakota, Minnesota & Eastern Railroad Corporation (DME) has filed a notice of exemption to acquire and operate portions of the Chicago and North Western Transportation Company's (CNW's) lines between Rapid City, SD, and Winona, MN, including branch lines to Onida and Watertown, SD, and Comfrey, Hartland, and Plainview, MN; from Redfield to Mansfield, SD; and from Aberdeen, SD, to Oakes, ND. The transaction covered by the notice of exemption includes incidental trackage rights, to be granted or assigned by CNW at Rapid City, SD, and at Mankato, Owatonna, and Winona, MN; between Wolsey and Aberdeen, SD; and between Hartland, MN, and Mason City, IA. A total of 965.7 route-miles are being acquired by DME, including both the lines being purchased and the trackage rights being granted or assigned. CNW will retain limited easements in the lines between Tracy and Mankato, Mankato and Waseca, Waseca and Owatonna, and Waseca and Hartland, MN, but CNW will not be entitled to make any use of those easements for any purpose, including common carrier service, except on the occurrence of certain conditions subsequent, and subject to any required regulatory approval or exemption. Any comments must be filed with the Commission and served on Betty Jo Christian, Steptoe

& Johnson, 1330 Connecticut Avenue, N.W., Washington, DC 20036-2661.

The notice is filed under 49 C.F.R. 1150.31. If the notice contains false or misleading information the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not delay the effective date of the notice. Petitions to stay will not automatically stay the transaction.

Decided: August 27, 1986.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

/s/ Kathleen M. King
KATHLEEN M. KING
Acting Secretary

(SEAL)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5071MN

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

vs.

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY AND DAKOTA, MINNESOTA AND EASTERN RAILROAD,
Appellees.

STATE OF SOUTH DAKOTA,
Amicus Curiae/Appellee.

Appeal from the United States District Court
for the District of Minnesota

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

May 31, 1988

Order entered in accordance with opinion.

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX E

Statutes Relied Upon

I. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 2 First

45 U.S.C. § 152 First

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

B. Section 2 Seventh

45 U.S.C. § 152 Seventh

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

C. Section 6

45 U.S.C. § 156

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the

parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

II. Interstate Commerce Act, 49 U.S.C. § 10101 et seq. (Excerpts)

A. Section 10505

49 U.S.C. § 10505

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or services is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continued intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

B. Section 10901

49 U.S.C. § 10901

§ 10901. Authorizing construction and operation of railroad lines

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or will be enhanced by the construction or acquisition (or both) and operation of the railroad line.

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Commission shall—

(1) send a copy of the application to the chief executive officer of each State that would be directly affected by the construction or operation of the railroad line;

(2) send an accurate and understandable summary of the application to a newspaper of general circulation in each area that would be affected by the construction or operation of the railroad line;

(3) have a copy of the summary published in the Federal Register;

(4) take other reasonable and effective steps to publicize the application; and

(5) indicate in each transmission and publication that each interested person is entitled to recommend to the Commission that it approve, deny, or take other action concerning the application.

(c) (1) If the Commission—

(A) finds public convenience and necessity, it may—

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions the Commission finds necessary in the public interest; or

(B) fails to find public convenience and necessity, it may deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the construction or acquisition (or both) and operation approved by the Commission.

(d) (1) Where a rail carrier has been issued a certificate of public convenience and necessity by the Commission authorizing the construction or extension of a railroad line, no other rail carrier may block such construction or extension by refusing to permit the carrier to cross its property if (A) the construction does not unreasonably interfere with the operation of the crossed line, (B) the operation does not materially interfere with the operation of the crossed line, and (C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the carriers are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Commission for determination.

(e) The Commission may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to section 11347 of this title.

APPENDIX F

Railway Labor Executives' Association
Member Organizations

American Railway & Airway Supervisors' Association (Division of TCU);

American Train Dispatchers' Association;

Brotherhood of Locomotive Engineers;

Brotherhood of Maintenance of Way Employes;

Brotherhood of Railroad Signalmen;

Brotherhood of Railway Carmen (Division of TCU);

Hotel Employees and Restaurant Employees International Union;

International Association of Machinists and Aerospace Workers;

International Brotherhood of Boilermakers and Blacksmiths;

International Brotherhood of Electrical Workers;

International Brotherhood of Firemen & Oilers;

International Longshoremen's Association;

National Marine Engineers' Beneficial Association;

Railroad Yardmasters of America (Department of UTU);

Seafarers' International Union of North America;

Sheet Metal Workers' International Association;

Transport Workers Union of America;

Transportation • Communications Union (TCU); and

United Transportation Union.

Supreme Court, U.S.
FILED
JUN 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2049

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY and DAKOTA, MINNESOTA & EASTERN RAILROAD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY IN RESPONSE TO PETITION FOR CERTIORARI

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June 27, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Railway Labor Act overrides an Interstate Commerce Commission order authorizing railroad line sales to new carriers within the Commission's jurisdiction under 49 U.S.C. § 10901 to be consummated on seven days' notice, without protection for employees from the effects of the transactions, where application of Railway Labor Act requirements would prevent consummation of the sales as authorized by the Commission?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-2049

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY and DAKOTA, MINNESOTA & EASTERN RAILROAD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY IN RESPONSE TO PETITION FOR CERTIORARI

Respondent Chicago & North Western Transportation Company ("C&NW")[1] agrees with petitioner Railway Labor Executives' Association ("RLEA") that the question presented as to the proper accommodation between the Interstate Commerce Act and the Railway Labor Act is of overriding importance to the railroad industry, that review by this Court is required to resolve a square conflict among the circuit courts of appeals on the question presented, and that certiorari should therefore be granted.

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[1] C&NW's Statement under Rule 28.1 appears in its Response to Motion to Expedite Consideration of Petition for Certiorari, filed June 24, 1988.

STATEMENT OF THE CASE

This case is the first of a series of pending cases[2] in which RLEA and its member unions have attempted to invoke the "status quo" provisions of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, to enjoin sales of rail line under § 10901 of the Interstate Commerce Act pending exhaustion of RLA major dispute procedures over the effects of the sales on the sellers' employees, although the Interstate Commerce Commission ("ICC") has authorized consummation of such sales on an expedited basis without protection of employees from the effects of the sales, pursuant to a class exemption order and regulations promulgated under § 10505 of the Act. *Ex Parte No. 392 (Sub-No. 1)—Class Exemption For The Acquisition & Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1986), codified at 49 C.F.R. §§ 1150.31-34, *aff'd mem. sub nom. Illinois Commerce Comm'n* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987).

Respondent C&NW, which like other Class I rail carriers has had serious revenue adequacy problems for years,[3] has been obliged to abandon more than 5000

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[2] See *RLEA* v. *City of Galveston*, No. 87-6169 (5th Cir. June 23, 1988); *RLEA* v. *Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3d Cir. 1988), *petition for certiorari pending*, No. 87-1888; *Chicago & N.W. Transp. Co.* v. *RLEA*, No. 88-C-444 (N.D. Ill. Mar. 16, 1980), *appeal pending*, No. 88-1504 (7th Cir.); *United Transp. Union* v. *Burlington N. R.R.*, 672 F. Supp. 1579 (D. Mont. 1987), *appeal pending*, No. 87-4386 (9th Cir); *CSX Transp. Inc.* v. *United Transp. Union*, No. CIV-87-1147C (W.D.N.Y. June 2, 1988), *appeal pending*, No. 88-7461 (2d Cir.); *Burlington N. R.R.* v. *United Transp. Union*, No. 86-5013-CV-SW-0 (W.D. Mo.); *RLEA v. Association of American Railroads*, No. 87-2145 (D.D.C.); *RLEA* v. *Soo Line R.R.*, No. 87-0696-CV-W3 (N.D. Ill.); *RLEA* v. *MT Properties, Inc.*, No. 3-87-493 (D. Minn.).

[3] No Class I railroad has been "revenue adequate" for the past several years—none of them have generated sufficient revenues from their rail operations to cover their costs and yield a reasonable

miles of its track in the past decade alone. (J.A. 47, 53).[4] In *Ex Parte No. 392*, however, the ICC attempted to alleviate the need for such abandonments, with their attendant loss of railroad jobs and service, by providing railroads in C&NW's position with an alternative means of disposing of marginal or unprofitable lines: sales and other transfers to new short line or regional railroads that typically have lower operating costs than the larger carriers.

In *Ex Parte No. 392*, the ICC exercised its exemption authority under § 10505 of the Act to relieve sales to new entrants into the industry from detailed prior review requirements under § 10901, substituting an expedited "method * * * to acquire Commission approval" under which these sales may be consummated upon seven days' notice to the Commission. 1 I.C.C. 2d at 811, 820.[5] The ICC also declined RLEA's request that labor protective conditions be imposed on these transactions. The Commission determined that formal labor protection was not needed, because sales of these lines to new carriers ordinarily preserve jobs for rail employees that would otherwise ultimately be lost in abandonments, and thus constitute the best protection available in most cases, and also that the cost of further labor protection conditions would "discourage acquisitions and operations that should be encouraged." *Id.* at 814-15. However, the ICC recognized that in "an extraordinary case" addi-

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return on investment. See *Railroad Revenue Adequacy—1986 Determination*, 3 I.C.C. 2d 966 (1987); *Railroad Revenue Adequacy—1985 Determination*, 3 I.C.C. 2d 541 (1987); *Railroad Revenue Adequacy—1984 Determination*, 1 I.C.C. 2d 615 (1986); *Railroad Revenue Adequacy—1983 Determination*, 1 I.C.C. 2d 734 (1984).

[4] "J.A." citations refer to the Joint Appendix in the court of appeals. "Pet." citations refer to the Petition for Certiorari, and "App." citations refer to its Appendices.

[5] The ICC has since extended the preconsummation notice period for certain large-scale § 10901 transactions to 35 days. 53 Fed. Reg. 5981 (Feb. 29, 1988).

tional labor protection arrangements might be warranted, and reserved jurisdiction to resolve disputes over labor protection on petitions for revocation of the class exemption in particular cases under § 10505(d) of the Act. *Id.* at 815. RLEA appealed the ICC's labor protection ruling to the United States Court of Appeals for the District of Columbia Circuit, which affirmed *per curiam* "for the reasons set forth in the decision of the Commission." *Illinois Commerce Comm'n* v. *ICC*, *supra*. RLEA did not seek certiorari.

In August 1986, C&NW and respondent Dakota, Minnesota & Eastern Railroad ("DM&E") obtained ICC authority under *Ex Parte No. 392* for the sale to DM&E of C&NW's line between Winona, Minnesota and Rapid City, South Dakota. *Dakota, M. & E. R.R.—Acquisition & Operation Exemption*, 51 Fed. Reg. 32260 (Sept. 10, 1986). That line had previously been the subject of abandonment proceedings before the ICC, and at the time of the sale was in part inoperable due to debilitation of the track (J.A. 207, 215-25, 226, 230). Indeed, only some 169 C&NW employees were deployed along the line—most of whom DM&E offered to employ. (J.A. 60, Pet. 6).

Nonetheless, RLEA's member unions opposed the sale, and when it was announced in July 1986 they served notices upon C&NW, ostensibly under § 6 of the RLA, demanding that C&NW and DM&E agree to provide the labor protection that the ICC had declined to grant in *Ex Parte No. 392*.[6] RLEA then brought suit on August 19, 1986, against C&NW and DM&E in the United States District Court for the District of Minnesota, claiming that C&NW was obliged to exhaust RLA "ma-

[6] The union notices sought so-called *New York Dock* and *Oregon Short Line III* protections, the conditions that the ICC typically imposes on rail mergers and abandonments, respectively. See *New York Dock Ry.—Control—Brooklyn E.D. Terminal*, 360 I.C.C. 60 (1979), *aff'd*, 609 F.2d 83 (2d Cir. 1979); *Oregon Short Line R.R.—Abandonment*, 360 I.C.C. 91 (1979).

jor dispute" procedures with respect to the effect of the sales on employees, and that the Act's "status quo" requirements for major disputes prohibited consummation of the sale in the meantime.

On August 27, 1986, the district court denied RLEA's motion for a preliminary injunction against the sale. (App. 9a-11a). The sale was therefore consummated on September 4, 1986. RLEA thereafter abandoned any claim that the sale should be undone, but continued to claim that consummation violated the RLA status quo requirements and sought back pay for employees affected by that alleged violation, and sought to require C&NW to submit the dispute over labor protection in the sale to RLA major dispute procedures. On January 7, 1987, the district court granted motions by C&NW and DM&E for summary judgment, holding that a "decision favorable to the plaintiff would put this Court directly at odds with the regulatory scheme established by *Ex Parte No. 392*," where the ICC indicated "that it is the final authority in determining whether to impose labor protection in the sale of lines to new carriers," and that "[b]ecause the relief that plaintiff is seeking is so at odds with the ICC order in the present case, the only recourse it has is to the Court of Appeals, which has * * * exclusive authority to modify or rescind *Ex Parte No. 392*." (App. 6a-7a).

On appeal, the Eighth Circuit affirmed, holding that "the provisions of the ICA governing labor protective agreements supersede the mandatory bargaining requirements of the RLA." (App. 4a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Although C&NW prevailed in this case, and in our view the judgment below was clearly correct, the decision below conflicts squarely with that of the United States Court of Appeals for the Third Circuit in *RLEA* v. *Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3d Cir. 1988), *petition for certiorari pending*, No. 87-1888, and

that of the United States Court of Appeals for the Fifth Circuit in *RLEA* v. *City of Galveston*, No. 87-6169 (5th Cir. June 23, 1988). The uncertainty engendered by this split in the circuits has called a practical halt to pending *Ex Parte No. 392* sales and thus threatens to undermine the ICC's policy of encouraging such sales, leading to railroad bankruptcies and abandonments of lines that might otherwise be salvaged in the hands of new operators. Accordingly, although C&NW would prefer a denial of certiorari, it agrees with RLEA that "the issues presented by this and other similar cases are important to the industry and need to be resolved by this Court." (Pet. 12).

ARGUMENT

This Case Presents Issues Of Critical Importance To The Railroad Industry, Its Employees, and The Public Interest As To Which The Courts of Appeals Are In Conflict

1. As RLEA points out, there is perhaps no more important issue between rail management and labor than the extent to which Railway Labor Act major dispute and status quo provisions may be enforced to restrain the consummation of *Ex Parte No. 392* transactions without the labor protections that the ICC has determined to be contrary to the public interest. The court below held that Railway Labor Act major dispute procedures are "superseded" by the Interstate Commerce Act provisions for ICC determination of labor protection issues in transactions within its jurisdiction under § 10901. That holding is firmly rooted in decisions of this Court such as *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 319-20 (1981), which recognized that the ICC's jurisdiction under the predecessor provision to § 10901 is "exclusive and plenary,"[7] and *United States*

[7] *Kalo Brick* construed former § 1(18) of the Act, which in 1976 was divided into abandonment provisions now codified at § 10903 and acquisition provisions now codified at § 10901; the recodification did not affect the scope of the ICC's authority over transactions formerly governed by § 1(18). See 450 U.S. at 319-21.

v. *Lowden*, 308 U.S. 225, 235-36 (1939), which recognized that the ICC's discretionary power over the "granting and withholding of" labor protection is "an essential aid to the maintenance" of the interstate railroad system "uninterrupted by labor disputes * * *."[8] It likewise is firmly rooted in the history of the ICC's labor protection authority under the ICA; for over 50 years disputes over protection of employees from the effects of transactions requiring ICC authorization have been determined by the ICC pursuant to that authority, rather than under the RLA, when the parties could not resolve the issues by voluntary agreement. And, when labor has been dissatisfied with the ICC's decisions it has turned to Congress, rather than to the RLA, obtaining numerous refinements and modifications by Congress of the ICC's comprehensive protection authority.[9]

Nonetheless, in *Pittsburgh & Lake Erie*, *supra* (sometimes referred to as *"PL&E II"*), the Third Circuit reached a decision that conflicts directly with the decision below in this case. In *PL&E II* the Third Circuit affirmed an injunction against an *Ex Parte No. 392* sale while labor protection disputes are processed under the "long and drawn out,"[10] "almost interminable"[11] RLA major dispute procedures, which may culminate in strikes and nationwide secondary picketing if the parties fail to agree,[12] even though the court recognized that its holding "may well have the practical effect of torpedoing the sale." 845 F.2d at 429. The Fifth Circuit recently adopted the Third Circuit's reasoning to reach the same result in *RLEA v. City of Galveston*, *supra*. We submit

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[8] See *ICC* v. *Railway Labor Ass'n*, 315 U.S. 373, 375 (1942).

[9] See, *e.g.*, *Simmons* v. *ICC*, 760 F.2d 126, 130 (7th Cir. 1985) (noting active participation of rail unions in "revisions of the Interstate Commerce Act").

[10] *Railway Clerks* v. *Florida E.C. R. Co.*, 384 U.S. 238, 246 (1966).

[11] *Shore Line* v. *Transportation Union*, 396 U.S. 142, 149 (1969).

[12] *Burlington Northern R.R.* v. *Brotherhood of Maintenance of Way Employes*, 107 S. Ct. 1841 (1987).

that the holdings of the Third and Fifth Circuits are incorrect, but litigation over the issue continues in other courts,[13] and there is no possibility that the conflict among the Eighth, Third, and Fifth Circuits will be resolved without this Court's intervention.

Although we believe that the judgment below was plainly correct, and the Third Circuit's decision plainly incorrect, and although that decision is also before this Court on petition for certiorari, RLEA has suggested elsewhere that the *P&LE* case may be mooted in the near future;[14] if so, the questions presented there and here may evade resolution by this Court for some time to come unless certiorari is granted in this case.

2. The questions presented warrant immediate review by this Court because they are of paramount importance to the railroad industry. The *Ex Parte No. 392* decision was expressly intended to stem the tide of railroad abandonments that had resulted from the financial decline of the industry during the past decades. As the ICC recently explained:

> "Abandonment, by its nature, is most often a painful, disappointing process. It normally entails the permanent loss of jobs and railroad service, even though it has not always occurred in markets that are inherently unserviceable by rail. Markets that produce losses when operated by Class I railroads can produce profits for smaller, more efficient local carriers. These new carriers are potentially beneficial to nearly all concerned. They preserve rail service for the local economies and provide traffic feed for the larger carriers, enhancing employment prospects for rail labor—both on the smaller lines and throughout a reinvigorated Class I system."

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[13] See *supra* n.2.

[14] See Brief of Respondent Railway Labor Executives' Association In Response to the Petition, p. 5, *P&LE II* (No. 87-1888).

FRVR Corp.—Exemption Acquisition & Operation—Certain Lines of Chicago & N.W. Transp. Co.—Declaratory Order, ICC Finance Docket No. 31205, p. 1 (served Jan. 29, 1988), *petition for review pending*, No. 88-1280 (8th Cir.).

Moreover, as the ICC has noted, until the recent spate of litigation over the applicability of the RLA to § 10901 sales and union strikes and strike threats over labor protection demands in connection with such sales, "[t]he Commission's policy ha[d] been validated by practical results. New railroad formation quickened, abandonments fell, service was maintained and typically improved, and rail jobs that might otherwise have been lost were preserved." *Id.* pp. 2-3. However, RLEA's attempts to enjoin line sales under *Ex Parte No. 392* or alternatively to strike to prevent them and the conflicting decisions in the lower courts with respect to those efforts are "threatening to halt the revitalization of the marginal railroad sectors—a restructuring that the Commission has found to be in the interest of carriers, labor, and the shipping public." *Id.* p. 6.

In short, it is agreed by all concerned—RLEA, the ICC, and the railroad industry [15]—that the questions presented here are crucially important for the future of this industry, and also for its employees and the public that relies on it. Prolongation of present uncertainties will inevitably lead to further unnecessary contraction of the industry and employment opportunities in it. The question presented by this case requires prompt resolution by this Court.

3. This case should not be held for any other pending cases; we urge the Court to rule on the petition for certiorari at this time.

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[15] See Brief For The National Railway Labor Conference As Amicus Curiae In Support of the Petition, *P&LE II* (No. 87-1888).

a. RLEA has suggested that *RLEA* v. *Guilford Transp. Industries, Inc., petition for cert. pending*, No. 87-1911 ("*Guilford*"), should serve as a vehicle for resolution of issues concerning labor protection in ICC-authorized transactions.[16] *Guilford* has nothing to do with the question presented by this case and the conflict in the courts of appeals with respect to that question, however. The question here is whether the RLA can be used to block sales within the ICC's jurisdiction under § 10901. *Guilford*, on the other hand, concerns an entirely different provision of the ICA, § 11343, and the applicability of the express immunity provision for § 11343 transactions in § 11341(a) of the Act to RLA major dispute procedures in a context in which the ICC lacks the power to withhold labor protective conditions. It is thus both legally and factually distinguishable from this and other pending § 10901 cases. Moreover, as RLEA has conceded, the *Guilford* case too is dogged by the prospect of imminent mootness.[17] In any event, *Guilford* is not an appropriate vehicle, and cannot be a vehicle, to decide the question presented here, as to which the Third, Fifth, and Eighth Circuits are in direct conflict.

b. The ICC has suggested that all these cases be held in abeyance until after the Eighth Circuit acts on a petition for rehearing in *Burlington Northern R.R.* v. *United Transp. Union*, Nos. 87-2581 and 87-2600 (8th Cir. May 31, 1988) ("*Burlington Northern*").[18] That case presents a different issue, too. Following the ICC's rejection of its labor protection demands in *Ex Parte No. 392*, RLEA commenced a two-pronged attack on the

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[16] See Brief of Respondent Railway Labor Executives' Association In Response to the Petition, p. 3, *P&LE* II (No. 87-1888).

[17] Supplemental Brief of Petitioner Railway Labor Executives' Association, *et al.*, pp. 5-6, *Guilford* (No. 87-1911).

[18] See Memorandum of the Interstate Commerce Commission, *P&LE II* (No. 87-1888).

ICC's labor protection determination: First, it has sought injunctions against line sales in cases like this, claiming that the RLA overrides the Commission's authorization of such sales without labor protection, a claim that requires reconciliation of the RLA and the ICA (what we have called elsewhere the "RLA accommodation issue" [19]). Second, it has engaged in strikes against such sales, claiming that the Norris-LaGuardia Act ("NLGA") need not be accommodated to the ICA scheme for resolution of disputes over labor protection and therefore bars injunctions against such strikes, a claim requiring reconciliation of the NLGA and the ICA (the "NLGA accommodation issue"). This case and *PL&E II* present the first issue, the RLA accommodation issue. *Burlington Northern* presents the NLGA accommodation issue, which is also before this Court in the first *PL&E* decision (*"PL&E I"*), *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3d Cir. 1987), *petition for cert. pending*, No. 87-1589.

While the rail industry believes the NLGA accommodation issue should be decided by this Court and has urged the Court to grant certiorari in *PL&E I*,[20] the RLA accommodation issue presented by this case and *PL&E II*, and the NLGA accommodation issue, presented by *Burlington Northern* and *PL&E I*, are separate and distinct issues that can be briefed and decided separately, as, indeed, occurred below in the *PL&E* litigation. Moreover, the RLA accommodation issue presented by this case and *PL&E II* will not necessarily be decided by this Court in the NLGA accommodation cases: the Third and Eighth Circuits have reached the same result as to the NLGA accommodation issue in *PL&E I* and

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[19] Response of Chicago & North Western Transportation Company to Motion to Expedite Consideration of Petition for Certiorari, p. 3.

[20] See Brief For The National Railway Labor Conference As Amicus Curiae In Support of the Petition, *P&LE I* (No. 87-1589).

Burlington Northern, and diametrically opposed results as to the RLA accommodation issue in *PL&E II* and this case. It would be damaging to revitalization of marginal lines throughout the industry to postpone a decision of the issues pending the Eighth Circuit's decision on the petition for rehearing in *Burlington Northern*, which could take some months.[21] It would also be potentially damaging to C&NW, for the RLA accommodation issue needs resolution, and RLEA asserts back pay claims against C&NW which continue to mount pending a final decision.

c. Finally, this case should not be held in abeyance pending this Court's disposition of *PL&E II*. These cases both present the same issue, the RLA accommodation issue, as to which the decisions of the courts below are directly in conflict. Accordingly, both cases should be set down now for argument after the Court returns in October, particularly in view of suggestions that *PL&E II* may become moot. That would permit briefing during the summer and argument soon after the Court reconvenes, thus substantially expediting a decision by this Court on the important RLA accommodation issue presented by this case.

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[21] For example, the Eighth Circuit recently acted on a petition for rehearing in a Railway Labor Act case involving this Respondent that had been pending for nearly five months. *Beardsley* v. *Chicago & North Western Transp. Co.*, No. 86-1369 (8th Cir. June 15, 1988) (petition for rehearing filed Jan. 21, 1988).

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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RAILWAY LABOR EXECUTIVES' ASSOCIATION,
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CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY and DAKOTA, MINNESOTA & EASTERN RAILROAD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE STATE OF SOUTH DAKOTA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the exclusive jurisdiction of the Interstate Commerce Commission under 49 U.S.C. § 10901 to authorize the sale of a railroad line and to determine whether or not to impose conditions to protect employees who might be adversely affected by such sales preempts and supersedes rights such employees would otherwise have under the Railway Labor Act to bargain for such protections and to block the consummation of such sales until the bargaining and mediation process provided under the Railway Labor Act has been completed.

2. Whether in any event the Railway Labor Act gives railroad employees a right to bargain about management's decision to sell part of the railroad, or about the effects thereof on employees.

3. Whether, if the Railway Labor Act does give employees the right to bargain about decisions to sell part of the railroad and the employees wish to bargain for contractual benefits that go beyond those set forth in their existing agreements, that Act prevents consummation of the sale until the completion of the bargaining and mediation process.

4. Whether the Norris-LaGuardia Act permits employees to strike in protest of sales of railroads or parts of railroads.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2049

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY and DAKOTA, MINNESOTA & EASTERN RAILROAD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE STATE OF SOUTH DAKOTA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The State of South Dakota, which filed briefs as amicus curiae in the district court and in the court of appeals, urges this Court to grant the petition for a writ of certiorari in this case to resolve the questions presented by the decision below, which are of the greatest importance and urgency to the nation's railroad system and on which the circuits are in direct conflict.

INTEREST OF SOUTH DAKOTA

South Dakota has a substantial interest in this case and the questions it presents. Adequate rail transportation is vital to South Dakota. The State is one of the

nation's leading agricultural producing states, and the transportation of those products to Eastern and Western markets is and must be principally by rail. South Dakotas' rail lines are also extremely important for the movement of coal across the country. In addition, the State's cement and wood product industries depend on rail transportation to reach many of their markets.

Major bankruptcies and other misfortunes that have plagued the railroad industry in recent years have left South Dakota particularly vulnerable and have necessitated unprecedented efforts by the State to preserve essential rail services. These have included the acquisition and rehabilitation of almost 900 miles of track abandoned by the bankrupt Chicago, Milwaukee, St. Paul and Pacific Railroad, which the Burlington Northern Railroad now operates for the State under lease and operating agreements.

The present case involves the other major rail system in the State. It was formerly owned by the Chicago and North Western Transportation Company ("C&NW") and runs from Rapid City eastward through Brookings, South Dakota, to Winona, Minnesota. In 1986 C&NW agreed to sell and assign their lines, associated branch lines and related trackage rights, totalling 966 miles, to a newly formed company, The Dakota, Minnesota & Eastern ("DM&E"), which is now headquartered in Brookings, South Dakota. The major portion of the lines and trackage rights that were sold are in South Dakota.

South Dakota believes that the sale of this very important line to an entity like DM&E, under the procedures and conditions prescribed by the Interstate Commerce Commission ("ICC") for such sales in *Ex Parte No. 392 (Sub-No. 1)—Class Exemption For the Acquisition and Operation of Rail Lines under 49 U.S.C. § 10901*, 1 I.C.C. 2d 810 (1986), was essential to stem its continuing deterioration and to prevent its ultimate

abandonment. The sale thus not only preserved essential rail service but also saved many jobs that would otherwise have been lost. The State believes that similar transfers in recent years of unprofitable or marginally profitable railroad lines from Class I railroads to new enterprises have saved thousands of other miles of railroad from abandonment and liquidation.

For all these reasons, South Dakota strongly supported the sale of this line to DM&E, and it participated in the district court and in the court of appeals as amicus curiae to oppose petitioner's arguments that the Railway Labor Act required the consummation of the sale to be enjoined. If this Court grants the petition for a writ of certiorari, South Dakota similarly intends to file a brief on the merits as amicus curiae.

ARGUMENT

THE QUESTIONS PRESENTED BY THIS CASE ARE OF EXCEPTIONAL IMPORTANCE AS TO WHICH THE COURTS OF APPEALS ARE IN CONFLICT.

1. This case is one of a number of cases in which petitioner and other railroad unions have sought to invoke provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, to enjoin sales and other transfers of marginally profitable or unprofitable rail lines to new enterprises for the purpose of exacting agreements from the parties to provide employee protective conditions that the ICC has specifically determined not to require in such transactions because they would unduly burden them and thus discourage them. Rail unions have also sought to exact such protective conditions by direct economic action—i.e., striking in protest of such sales—and have contended that the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, protects such actions from any judicial interference. If rail labor's legal contentions under either the Railway Labor Act or the Norris-LaGuardia Act are sustained, the result will be to preclude the transfer of

many lines such as the line in this case which, if they are not transferred, will eventually be abandoned because of the high labor costs associated with operating them. Indeed, the decisions of the United States Court of Appeals sustaining rail labor's position under the Norris-LaGuardia Act in *RLEA v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3d Cir. 1987), petition for certiorari pending, No. 87-1589 (*"P&LE I"*) and sustaining rail labor's position under the Railway Labor Act in *RLEA v. Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3d Cir. 1988), petition for certiorari pending, No. 87-1888 (*"P&LE II"*) have halted virtually all such transfers.

As discussed below, there is a direct conflict among the circuits on these issues which urgently requires this Court's resolution.

2. South Dakota submits that this case and the others cited present four distinct but integrally related issues all of which must be decided by this Court in order fully to resolve the controversy and dispel the uncertainty that is presently stifling the transfer and revitalization of rail lines.

a. The first issue is whether the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*, and the actions of the ICC approving line sales under 49 U.S.C. § 10901 (or exempting them from such approval under 49 U.S.C. § 10505) and specifically determining not to impose protective conditions for adversely affected employees, preempt or supersede whatever rights employees may have under the Railway Labor Act to seek such protections through bargaining or mediation and to prevent the sale from taking place until the bargaining and mediation process has been completed. Because the ICC has exclusive jurisdiction over such sales and because the Commission determined as a matter of national transportation policy that the imposition of employee protective conditions would impose an undue and often prohibitive cost on line transfers that are very much in the public

interest, the district court and Eighth Circuit in this case concluded that the Interstate Commerce Act does supersede employee's bargaining rights under the Railway Labor Act. Pet. App. 4a-5a. The Third Circuit in *P&LE II* concluded otherwise and accordingly affirmed an injunction against the consummation of a sale, despite that court's awareness of "the unfortunate ramifications and irony of our decision." 845 F.2d at 446. The Fifth Circuit has recently followed the Third Circuit's reasoning in *RLEA v. The City of Galveston, Texas*, 5th Cir. No. 87-6169 (June 23, 1988). This conflict among the Circuits on this important question warrants this Court's review and resolution.[1]

b. A second issue that is common to each of those cases and that is perhaps more fundamental than the ICC preemption issue is whether the Railway Labor Act applies at all to a railroad's decision to sell all or part of its business. South Dakota submits that under this Court's decision in *First National Maintenance v. NLRB*, 452 U.S. 666, 676 (1981) and the First Circuit's decision in *International Association of Machinists v. Northeast Airlines*, 473 F.2d 549 (1st Cir. 1972), the decision to sell a major segment of its business is exclusively man-

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[1] The decision of the First Circuit in *RLEA v. Guilford Transportation Industries, Inc.*, 1st Cir. No. 87-1774 (decided January 20, 1988) petition for cert. pending, No. 87-1911, presents an issue that is similar to the preemption issue in this case and *P&LE II* and *Galveston*; namely, whether the ICC's exemption of a transaction under 49 U.S.C. § 11343 preempts the bargaining rights of employees under the Railway Labor Act. *Guilford* is nevertheless distinguishable from the present case and from *P&LE II* and *Galveston* in a number of respects, because it involves different statutory provisions—§§ 11343 and 11341 rather than § 10901—and appears to involve fairly unique and non-recurring facts. As RLEA pointed out in its supplemental brief in No. 87-1911 filed June 20, 1988, several recent events have rendered the controversy in that case largely moot. For all those reasons, South Dakota beliefs that this Court's review of the *Guilford* case is not warranted.

agement's decision to make and that employees have no rights under the Railway Labor Act to bargain about that decision, either directly or in the guise of bargaining about its effects. As the First Circuit stated in rejecting the same Railway Labor Act argument advanced by petitioner in this case:

> To allow the Union to force a company to bargain about the effects of its management decisions to the extent of forcing it to forego the proposed change in operations would be in effect to take away from it the freedom to make the decision in the first place. . . . Where it is clear . . . that bargaining about some effects of a decision would be ineffectual unless the company could be required to renegotiate [it], we believe that the duty to bargain about those effects does not arise at all.

International Association of Machinists v. Northeast Airlines, 473 F.2d at 558-559. Accordingly even if the Court concludes that the Interstate Commerce Clause would not supersede the Railway Labor Act on these matters, the judgment below should nevertheless be sustained on the ground that the Railway Labor Act is simply inapplicable.

The Third Circuit in *P&LE II* however, reached the opposite conclusion from the First Circuit in the *Northeast Airlines*, case, and held that "[a] railroad has a duty to bargain over the effects of the transaction prior to implementing its unilateral decision to sell its rail assets." 845 F.2d at 430. This view gives rail labor an effective veto power over such sales and largely nullifies any notion that decisions on these matters are for management alone and are not proper subjects for the collective bargaining process. It is essential that this Court resolve this fundamental issue on which the circuits are in conflict.[2]

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[2] Although the Eighth Circuit in this case did not discuss this issue, it is nevertheless properly presented by the Eighth Circuit's

3. The third issue presented by the judgment below is whether, even if the sale of a railroad line or the effects thereof are appropriate subjects for bargaining under the Railway Labor Act, that Act prohibits railroad management from consummating a sale until the bargaining and mediation process has been completed. South Dakota submits that the petitioner's theory of the Railway Labor Act in this and other cases stands the scheme of that Act on its head. What petitioner wishes to obtain by bargaining are *new* rights over and above those in their existing agreements. Invoking the Railway Labor Act to block consummation of line sales until the bargaining and mediation process runs its "almost interminable"[3] course does not preserve the status quo but dramatically changes it, contrary to the scheme of the Act. See *United Transportation Union v. St. Paul Depot*, 434 F.2d 220, 223 (8th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971). Again, however, the Third Circuit in *P&LE II* concluded otherwise. 845 F.2d at 428.[4]

4. The fourth issue that the Court needs to resolve is whether the Norris-LaGuardia Act guarantees railroad employees the unfettered right to strike in protest of line

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judgment because it is an alternative ground for sustaining that judgment. A party may defend a lower court's judgment on any ground that sustains it whether or not the lower court considered that ground or even if it rejected it. *See, e.g., United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); *Dandridge v. Williams*, 397 U.S. 271, 475 n.6 (1970). This issue was fully briefed by South Dakota and the other parties in both the district court and the court of appeals.

[3] *Detroit & Toledo Short Line v. Transportation Union*, 396 U.S. 142, 149 (1969).

[4] Again, while this issue was not discussed by the court below, it is properly presented by its judgment because it is an alternative ground for affirmance. See n.2, *supra*. The issue was discussed at some length by the Third Circuit in *P&LE II*, which, in South Dakota's submission, misapplied this Court decision in *Detroit & Toledo Short Line v. Transportation Union*, 396 U.S. 142 (1969).

sales for the purpose of exacting protective conditions from their employers. This issue is directly presented by *P&LE I*, petition for cert. pending, No. 87-1589. While this issue is not directly presented by the judgment below, South Dakota submits that it is inextricably related to the issues that are presented and that its resolution by this Court is essential to fully resolve the controversy and uncertainty presently surrounding railroad line sales under 49 U.S.C. § 10901. That is so because even if the Court held that the Interstate Commerce Act superseded the Railway Labor Act in this area or that these matters are not a subject for bargaining under the Railway Labor Act, most such sales would not be feasible if unions were free to strike in order to exact the desired conditions by that means.

The issues under the Norris-LaGuardia Act are inextricably related to those under the Railway Labor Act and Interstate Commerce Act because whether the Norris-LaGuardia Act prohibits judicial interference with strikes depends on whether the strike is one "growing out of any labor dispute." 29 U.S.C. § 104. If disputes about line sales are not proper subjects of collective bargaining, either under the Railway Labor Act itself or because of the preemptive effect of the Interstate Commerce Act, then strikes over such sales would not be ones that grow out of a "labor dispute" within the meaning of the Norris-LaGuardia Act. To conclude that employees may strike over matters they have no right to bargain about with management would frustrate the basic purpose and design the Railway Labor Act to promote industrial peace by defining, in a broad but not unlimited fashion, those subjects about which management must bargain with labor and by carefully prescribing the mechanisms for resolving disputes over those matters.[5]

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[5] As noted, the Norris-LaGuardia Act issue is directly presented by the Third Circuit's decision in *P&LE I*. In another Eighth Circuit decision which is now subject to a petition for rehearing, the

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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July 14, 1988

Eighth Circuit also held that the Norris-LaGuardia Act prohibited an injunction against a strike protesting the sale of a railroad line. *Burlington Northern Railway Co. v. United Transportation Union*, 8th Cir. No. 87-2600 (decided May 31, 1988). Unlike the Third Circuit, however, the Eighth Circuit in the *Burlington Northern* case had also held that employees had no right under the Railway Labor Act to bargain about the effects of such sales. South Dakota submits that the Eighth Circuit's conclusion that employees may strike about something they have no right to bargain about is incorrect. Contrary to the suggestion of the Interstate Commerce Commission, South Dakota submits that this Court should not hold the petitions in this case and in *P&LE I* and *P&LE II* in abeyance pending the Eighth Circuit's decision on the rehearing request. Since the Norris-LaGuardia Act issue is directly presented in *P&LE I* and implicitly in the other cases, the Court should grant the pending petitions and resolve the issues they present without further delay.

(8) (11) (6) (3) (5)

Nos. 87-1589, 87-1888, 87-1911, 87-2049 and 88-464

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PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
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On Petitions for Writs of Certiorari to the United States Courts of Appeals for the First, Third, Seventh and Eighth Circuits

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SUPPLEMENTAL BRIEF FOR RAILWAY LABOR EXECUTIVES' ASSOCIATION

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Rules of the Supreme Court

Rule 22.6 1

IN THE

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OCTOBER TERM, 1988

Nos. 87-1589, 87-1888, 87-1911, 87-2049 and 88-464

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On Petitions for Writs of Certiorari to the United States Courts of Appeals for the First, Third, Seventh and Eighth Circuits

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SUPPLEMENTAL BRIEF FOR RAILWAY LABOR EXECUTIVES' ASSOCIATION

This supplemental brief is respectfully submitted by the Railway Labor Executives' Association [hereinafter, "RLEA"], pursuant to Rule 22.6 of the Rules of this Court, to present an overview of the pending petitions,

and in response to certain arguments made by the United States as an *amicus curiae* in Nos. 87-1589 and 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA*. This brief is also being submitted to bring to this Court's attention certain recent developments affecting No. 87-1911, *RLEA v. Guilford Transportation Industries, Inc.*

1. OVERVIEW OF PENDING CASES

Since March 24, 1988, when the petition for a writ of certiorari was filed in No. 87-1589, *Pittsburgh & Lake Erie R.R. v. RLEA*, a total of eight (8) petitions have been filed with this Court seeking writs of certiorari for this Court to review various issues arising from the rail industry's reliance upon the powers of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] over rail financial transactions, to assert that the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, relieves our nation's railroads of their bargaining and status quo obligations under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* While those petitions raise many different issues, RLEA, which is a party to each case, submits that the cases may be grouped into the following four categories by the issues which they present.

A. Collateral Attack Issues

Although the railroads have asserted throughout this litigation that the Interstate Commerce Act operates to relieve them of any "overlapping" obligation under the Railway Labor Act, the courts first relied upon the collateral attack concept to deny rail labor's efforts to enforce the Railway Labor Act's notice, bargaining and status quo commands. *E.g., RLEA v. Staten Island R.R.*, 792 F.2d 7 (2d Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987). That collateral attack issue is currently before this Court in five (5) of the eight petitions: No. 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA*; No. 87-1911, *RLEA v. Guilford Transportation Industries, Inc.*; No. 87-2049, *RLEA v. Chicago & North Western Transpor-*

tation Co.; No. 88-217, *ICC v. Pittsburgh & Lake Erie R.R.*; and No. 88-517, *City of Galveston v. RLEA*.

Of those five cases, RLEA submits that the *Guilford* case presents the best vehicle, for *Guilford* presents the collateral attack issue in a factual situation where the ICC imposed employee protections which the carriers asserted specifically authorized them to consummate the leases, notwithstanding the bargaining and status quo commands of the Railway Labor Act. *See, BLE v. Boston and Maine Corp.*, 788 F.2d 794, 800-01 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986). This case, therefore, presents not only the general collateral attack issue which arises when rail labor seeks to enforce the Railway Labor Act in cases involving ICC orders exempting a financial transaction, but the additional question of whether the imposition of employee protections requires a different result. This additional issue is highly relevant because some courts have relied upon the presence of ICC imposed protective conditions to conclude that enforcement of the Railway Labor Act's major dispute resolution processes would constitute a collateral attack on an ICC decision imposing specific conditions to protect employee interests. *BLE v. Boston and Maine Corp.*, *supra*, 788 F.2d at 800-02; *see*, ICC Pet. in No. 88-711 at 14-15. Thus, if this Court resolves the collateral attack issue presented by the pending petitions in a manner favorable to rail labor, but in a case in which employee protections were not imposed by the ICC, it is safe to assume that the ICC will then impose some minimal form of protection, such as the limited buyout offer involved in No. 88-464, *RLEA v. Chicago & North Western Transportation Co.*, and the courts will then be faced with the question of whether that fact makes enforcement of the Railway Labor Act a collateral attack on that ICC order.

In short, since the goal which the parties to the pending petitions are attempting to obtain is the final reso-

lution of as many vexing issues as possible, RLEA respectfully submits that *Guilford* should be one of the cases accepted for review.

In its brief to this Court as an *amicus* in Nos. 87-1589 and 87-1888, however, the United States asserts that it disagrees with RLEA that the *Guilford* case should be used as a vehicle to resolve any of the pending issues. U.S. Brief at 9 n.8. The United States takes that position because it assumes that the transactions in *Guilford* are subject to the express immunity granted by 49 U.S.C. § 11341(a) that, according to the Solicitor General, relieves a carrier participating in such "approved or exempted" transactions from any restraining or prohibitory law. *Id.* As the United States concludes: "Thus, the principles that govern transactions subject to Section 11341 are not necessarily applicable to transactions subject to Section 10901 and the *Ex Parte No. 392* class exemption." *Id.*

In asserting that Section 11341(a) applies to the lease *exemptions* involved in *Guilford*, the United States ignores the fact that Section 11341(a), by its express terms, applies only to "transaction[s] approved by or exempted by the Commission under this subchapter [*i.e.*, Sections 11341 to 11351] . . . ." 49 U.S.C. § 11341(a). Rail exemptions, such as those involved in *Guilford*, are granted under Section 10505, a section which is in an entirely different subchapter of the transportation statute. Moreover, as RLEA pointed out in its petition in No. 87-1911 (Pet. at 22-23), the import of the clear language of Section 11341(a) is supported by that section's legislative history, and by the ICC's holding in *Ex Parte No. 282 (Sub-No. 9), Railroad Consolidation Procedures—Trackage Rights Exemption*, 1 I.C.C.2d 270, 279 (1985), that: "[S]ection 11341(a) does not apply to the [Section 11343(a)] transactions exempted" under Section 10505.

Once it is accepted that Section 11341(a) does not apply to the lease exemptions in *Guilford*, that case then

presents the same collateral attack and conflict of laws issues as are involved in the other cases, except, as explained above, it has the additional feature of the impact of ICC imposed protections on both issues. Therefore, RLEA submits, Guilford should be used as one of the vehicles to resolve both the collateral attack and conflict of laws issues.

RLEA recognizes, however, that the possibility exists that this Court may not agree with RLEA's view of the law on the collateral attack issue, and therefore, RLEA agrees with the rail industry that at least one of the other pending collateral attack cases should also be accepted for review in the event that this Court concludes that the presence of employee protective provisions requires a different result than RLEA is advocating. As we have explained before, RLEA submits that its petition in No. 87-2049, *RLEA v. Chicago & North Western Transportation Co.*, should be that additional vehicle.

No. 87-1888 also presents a good vehicle for the non-employee protection collateral attack issue, but it suffers from one major defect.[1] Rail labor has been involved in negotiations with the Pittsburgh & Lake Erie Railroad [hereinafter, "P&LE"] and its creditors in an attempt to find a solution to the carriers' financial plight. So far, those negotiations have been unsuccessful. However, as shown by the letter to counsel for RLEA from RLEA's financial advisor, Mr. Brian M. Freeman, which has been lodged with this Court, it is possible that those efforts will be successful in the near future. A successful resolution of the current negotiations may include as part of the agreement the commitment of all parties (including RLEA and the P&LE) to dismiss "with prejudice" "all

[1] As explained below, RLEA's hesitancy to recommend the grant of the petition in No. 87-1888 lies in the possibility that the parties may agree to settle before this Court reaches a decision on the merits. That possibility, however, is far from a certainty, and, thus, this Court may wish to grant the petition in No. 87-1888, as well, for concurrent briefing with Nos. 87-1911, 87-2049, and 88-464.

actions brought by Rail [*sic*] Labor Executives' Association ('RLEA') against PLE relating to the sale of PLE's assets . . . ." Freeman letter dated November 14, 1988 at attachment, p. 9, ¶ (g).

It was for this reason that RLEA stated in its response to the P&LE's petition in No. 87-1888, that "there is a substantial question as to whether this case will still present a justiciable issue later this year or early next year." RLEA Brief in No. 87-1888 at 5.[2] While RLEA continues to question whether this case will remain viable, we agree that it is currently justiciable. However, while RLEA has a clear interest in continuing to press the validity of the Third Circuit's decision, RLEA also has an obligation to the P&LE rail employees which may require it to agree to dismiss its underlying complaint as a condition for an overall settlement. That same possibility does not exist in No. 87-2049 or in No. 87-1911.

In short, on the collateral attack issue, RLEA suggests that this Court grant the petitions in Nos. 87-1911 and 87-2049, and that this Court hold Nos. 87-1888 and 88-517 in abeyance. *But see*, note 1, *supra*. RLEA continues to maintain that No. 88-217 should be denied.

B. Conflict Of Laws Issues

RLEA respectfully submits that the issue which lies at the heart of the pending cases, although it is not presented in each petition, is the question of whether the Interstate Commerce Act supersedes the Railway Labor Act. That issue is squarely presented by five of the peti-

[2] In its brief (U.S. Brief at 9 n.8), the United States asserts that RLEA has suggested that No. 87-1888 may become moot because the P&LE no longer intends to sell to its original prospective purchaser, P&LE Railco, Inc. That assertion is incorrect, for RLEA has contended before, and continues to assert, that this case (No. 87-1888) will not be moot so long as the P&LE may sell its assets before it has completed the Railway Labor Act's major dispute resolution processes. *See, RLEA v. P&LE*, 845 F.2d 420, 427-28 n.8 (3rd Cir. 1988), *pets. for cert. pending*, Nos. 87-1888 and 88-217.

tions: No. 87-1888, *P&LE v. RLEA*; No. 87-1911, *RLEA v. Guilford*; No. 87-2049, *RLEA v. Chicago & North Western*; No. 88-217, *ICC v. P&LE*; and No. 88-711, *ICC v. UTU*. Of those five cases, Nos. 88-217 and 88-711 do not merit review by this Court since the ICC, which is the petitioner in both, lacks standing. Of the remaining three, RLEA again suggests that Nos. 87-1911 and 87-2049 be used as the test vehicles.

C. Railway Labor Act Issues

Running throughout virtually all of these cases is the question of what specific Railway Labor Act obligations are presented and believed by the rail carriers to be in conflict with the Interstate Commerce Act. Only two of the pending cases, besides the ICC's petition in No. 88-217, present that question: No. 87-1888, *P&LE v. RLEA*, and No. 88-464, *RLEA v. Chicago & North Western Transportation Company*. However, a primary distinction between those two cases is that the *Chicago & North Western* case deals with a sale of part of a railroad, and thus, does not present the same bargaining issue which arises from the fact that the *P&LE* case involves a railroad's attempt to go completely out of the railroad business.[3] While RLEA submits that this fact should not make any difference, the Seventh Circuit in the *Chicago & North Western* case concluded that this was a distinguishing factor. *See*, No. 88-464, Pet. at 16a-17a n.3. Thus, if this Court is to resolve as many issues as possible so that rail labor and management will know what their rights are in line sale cases, this Court should grant the petition in No. 88-464.

Another reason for granting the petition in No. 88-464 is that this case is the only one of the eight petitions which squarely presents the recently prevalent "minor

[3] It should be noted that the P&LE did not intend to dissolve, but simply to sell its rail lines and facilities and remain viable as a rail car leasing and real estate entity.

dispute" question. Since the contractual provisions upon which the C&NW relied in No. 88-464 to argue that the underlying controversy was a minor dispute, are common contractual provisions throughout the entire rail industry (*see*, RLEA Reply Brief in No. 88-464 at 6 n.1), it stands to reason that other carriers will advance an identical minor dispute defense in line sale cases. Indeed, this has already occurred, for in the two remaining district court cases arising from line sales, the carriers have raised that identical argument. One case is still pending, *RLEA v. Burlington Northern R.R.*, W.D.Mo. Civil Action No. 87-0696-CV-W-8, but in the other, the court relied upon the Seventh Circuit's *Chicago & North Western* decision to conclude that rail labor's claims raised only a minor dispute, even though Section 6 notices had been served by several unions. *Atchison, Topeka & Santa Fe Ry. v. RLEA*, N.D.Ill Civil Action Nos. 87 C 9847 and 87 C 9969, decided October 25, 1988.

A resolution of the question presented as to the scope of the status quo obligation is important to the conflict of laws issue. This is so because, obviously a conclusion that a carrier has an obligation to bargain over the effects of a sale on its employees, but that it is not precluded by the Act's status quo obligation from selling during that bargaining process, presents a different conflict issue than would be presented by the conclusion that the status quo obligation *does* preclude the sale before that bargaining is completed. Since No. 88-464 presents this issue, RLEA submits that the writ should be granted in that case.

D. Norris-LaGuardia Act Issue

Two of the pending cases present the additional issue of the relationship between the Interstate Commerce Act and the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* Those cases are: No. 87-1589, *P&LE v. RLEA*, and No. 88-711, *ICC v. UTU*. One of those cases, *ICC v. UTU*, does not present a case over which this Court has juris-

diction, and the other case suffers from the possible settlement problems inherent in No. 87-1888. RLEA has previously suggested that this Court hold No. 87-1589 in abeyance, and it continues to make that suggestion for the reasons set forth in its response to No. 87-1589.

2. RECENT EVENTS AFFECTING NO. 87-1911

In its earlier supplemental briefs in No. 87-1911, RLEA informed this Court that on June 12, 1988, an arbitrator issued an award which may affect the continued justiciability of No. 87-1911. That award—the Implementing Agreement award—is the subject of a review petition before the ICC. On November 15, 1988, the ICC conducted a public voting conference on that petition, and three of the five Commissioners voted to set aside that award insofar as it required the Springfield Terminal Railway Company to apply the rates of pay and work rules of the lessor carriers to the employees operating the leased lines. According to the statements made by the Commissioners at the voting conference,[4] they voted to set aside that portion of the award because the arbitrator's award limited the "management flexibility" which Guilford had hoped to achieve by the leases. As RLEA explained in its Supplemental Brief of September 30, 1988, at 4-5, that management flexibility was to be achieved through the abrogation of the lessors' collective bargaining agreements. However, rather than impose the Springfield Terminal work rules, the ICC voted to require the parties to negotiate, with the arbitrator acting as a mediator, the issue of the proper construction of the Springfield Terminal-United Transportation Union collective bargaining agreement, and the issue of what work rules should govern the lease operations. If the parties are unable to agree, then the "arbitrator"

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[4] RLEA has ordered a transcript of the voting conference and once it is obtained (at present, it is scheduled to be delivered on Monday, November 21, 1988), RLEA will lodge it with this Court.

is to submit to the Commission a recommended decision on those issues which the ICC will then review to devise the new collective bargaining "agreement." RLEA recognizes, however, that the full import of what the Commission will order in that case will not be known until it issues it written decision and order.

CONCLUSION

For the reasons set forth in RLEA's earlier pleadings, RLEA respectfully submits that this Court should grant the petitions in Nos. 87-1911, 87-2049 and 88-464.

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